WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
OCTOBER 2016

Cases scheduled for Oct. 26 will be heard at the BAYFIELD COUNTY COURTHOUSE, 117 E. 5TH St., Washburn, WI 54891. Other cases listed will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Dane
Fond du Lac
Kenosha
Milwaukee
Ozaukee
Racine
Sauk
Waukesha

THURSDAY, OCTOBER 13, 2016 (MADISON)

9:45 a.m.	14AP2981-CR	State v. Tabitha A. Scruggs
10:45 a.m.	14AP2603-CR	State v. Glenn T. Zamzow

TUESDAY, OCTOBER 18, 2016 (MADISON)

9:45 a.m.	15AP656-CR	State v. Patrick K. Kozel
10:45 a.m.	15AP79	Maya Elaine Smith v. Jeff Anderson
1:30 p.m.	14AP1767-CR	State v. Brian I. Harris

THURSDAY, OCTOBER 20, 2016 (MADISON)

9:45 a.m.	14AP2840-CR	State v. Christopher Joseph Allen
10:45 a.m.	14AP1870-CR	State v. David W. Howes
1:30 p.m.	14AP2236	Carolyn Moya v. Healthport Technologies, LLC

WEDNESDAY, OCTOBER 26, 2016 (WASHBURN)

9:30 a.m.	15AP158-CR	State v. Rozerick E. Mattox
11:00 a.m.	14AP2376	Russell T. Brenner v. National Casualty Company
2:00 p.m.	15AP202-CR	State v. Jeffrey C. Denny

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Rick Blum at (608) 271-4321. If your news organization is interested in camera coverage of Oct. 26 oral argument in Bayfield County, contact media coordinator Jon Ellis at WDIO-TV at (218) 279-7723 or jellis@wdio.com . Summaries provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
9:45 a.m.
Thursday, Oct. 13, 2016

2014AP2981-CR State v. Scruggs

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Racine County, Judge Allan B. Torhorst, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent-Respondent, v. Tabitha A. Scruggs, Defendant-Appellant-Petitioner

Issue presented: This criminal case examines the constitutionality of retroactive application of the mandatory DNA surcharge, which requires defendants to pay a $250 DNA surcharge for every felony conviction, and a $200 DNA surcharge for every misdemeanor conviction. The Supreme Court reviews:

- whether the state and federal prohibitions against ex post facto laws are violated when the surcharges are imposed on defendants who committed their crimes before Jan. 1, 2014.
- whether the Court of Appeals misapplied the test for determining whether a law violates ex post facto by failing to separately consider the punitive intent *and* the punitive effect of the mandatory DNA surcharge.

Some background: The criminal complaint in this matter charged that on Dec. 30, 2013, Tabitha A. Scruggs committed one count of burglary as a party to a crime. She pled no contest to the offense on April 1, 2014, and was subsequently sentenced. As part of the sentence she was ordered to provide a DNA sample and pay a $250 DNA analysis surcharge.

Scruggs filed a post-conviction motion seeking to vacate the DNA surcharge. At the time she committed the crime, the imposition of a $250 DNA surcharge for the offense was subject to the circuit court's discretion. By the time she was convicted and sentenced, the Legislature had made the $250 DNA surcharge mandatory for all felony convictions. Scruggs argued that because § 973.046(1r)(a), making the surcharge mandatory, did not take effect until Jan. 1, 2014, two days after she committed the crime, the change in the DNA surcharge from discretionary to mandatory could not be assessed against her without running afoul of the constitutional protections against ex post facto laws. Scruggs argued the circuit court should have applied § 973.046 as it existed at the time she committed the offense, meaning it would have been up to the discretion of the circuit court whether or not to impose the surcharge.

The circuit court concluded it was required to impose the $250 DNA surcharge under the new statute. The court reasoned that since the amendment to the statute was enacted on June 30, 2013, and published on July 1, 2013, it was "in effect" at the time Scruggs committed the crime, even though the enabling legislation provided it was effective on the first day of the sixth month after publication or Jan. 1, 2014. Accordingly, the circuit court denied the post-conviction motion. The Court of Appeals affirmed.

On appeal, the state conceded that the circuit court erred when it held that the amendment to the statute was in effect when Scruggs committed the crime. However, the state argued that the statutory amendment as applied to Scruggs was not punitive and therefore there was no violation of the ex post facto clauses of the U.S. and Wisconsin Constitutions.

The Court of Appeals noted that it recently held, in an as-applied challenge, that the statutory amendment was an ex post facto law violation when the $250 surcharge was imposed for each of multiple felony convictions. It noted in State v. Radaj, 2015 WI App 50, ¶¶21, 37, 363 Wis. 2d 633, 866 N.W.2d 758, the defendant had been convicted of four felonies and was assessed a $1,000 DNA surcharge, or $250 for each of the convictions. The Radaj court assumed without deciding that the Legislature's intent behind the statutory amendment was non-punitive, but it went on to conclude that the effect of assessing a separate $250 DNA surcharge for each felony conviction was to punish a defendant.

Scruggs argues that the DNA surcharge is punitive in effect. She says the surcharge is completely unrelated to the costs of DNA analysis. She says the surcharge is collected for every conviction in every case, regardless of whether DNA is collected or analyzed. She asserts the fact that the penalty is called a "surcharge" does not control, and she says placement of the DNA surcharge statute within the criminal sentencing statutes reflects a legislative intent to impose a penalty.

Wisconsin Supreme Court
10:45 a.m.
Thursday, Oct. 13, 2016

2014AP2603-CR State v. Zamzow

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Fond du Lac County, Judge Gary R. Sharpe, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Glenn T. Zamzow, Defendant-Appellant-Petitioner

Issue presented: The issue raised in this case is whether the Sixth Amendment confrontation clause applies at a pretrial suppression hearing.

Some background: Defendant Glenn Zamzow was convicted of operating a motor vehicle while intoxicated (OWI) and with a prohibited blood-alcohol concentration (PAC), third offense.

On March 13, 2011, Fond du Lac Police Officer Birkholz executed a traffic stop of Zamzow that resulted in the OWI/PAC charges. Zamzow filed a motion to suppress, arguing that Birkholz, who had died by the time of the hearing, lacked reasonable suspicion to stop him.

At the suppression hearing, a squad car recording was admitted into evidence. Zamzow objected to the admission of the audio portion of the recording on hearsay grounds and on the basis that admission would violate his rights under the confrontation clause of the Sixth Amendment to the United States Constitution. The circuit court overruled the objection.

Both the video and audio portions of the recording were admitted and played for the court, with the court reporter taking down the audio portion. In the recording, Birkholz approaches Zamzow's vehicle after pulling him over and says, "The reason I stopped you is you were crossing the center line there coming at me and then again when I turned around and got behind you."

The circuit court said it observed in the video Birkholz turning around, speeding up, and eventually getting behind and stopping Zamzow's vehicle and that it appeared as if Zamzow's tires were "very close to and/or upon the center line." The court said it could not tell if the tires had actually crossed the center line. The court found that Zamzow had crossed the center line twice, saying it was "relying upon the officer's [statement on the recording] as to the cross of the center line that [the officer] observed more so than the specifics I observed in the video." The court concluded there was a sufficient basis for the stop and it denied the motion to suppress.

Following denial of a motion for reconsideration, Zamzow appealed. The Court of Appeals, with Judge Paul F. Reilly dissenting, affirmed.

Zamzow argued that due solely to his inability to cross-examine the officer, that evidence was not sufficiently reliable for the circuit court to rely upon it in finding reasonable suspicion for the stop. The Court of Appeals disagreed, saying unlike a police report, the audio recording gave the circuit court a real time observance of the actual interaction between Birkholz and Zamzow. It said while Zamzow was not able to challenge the officer's observations for defects in perception, that did not make the officer's recorded statement unreliable. It noted the question at the suppression hearing was whether a reasonable officer, knowing what the officer on the scene knew at the time of the stop, would have had reasonable suspicion that Zamzow had

violated or was violating the law. The appellate court said the lower court properly concluded that the officer's recorded statement provided reliable evidence that the officer had observed Zamzow cross the center line, providing the legal basis for the stop.

The Court of Appeals rejected Zamzow's contention that the circuit court's determination that the officer had reasonable suspicion to stop him was based solely on the officer's recorded statement as to why he had pulled Zamzow over. The appellate court said while the circuit court did say at the suppression hearing that it was relying "more so" on the officer's statement of twice observing Zamzow cross the center line, that was not the only evidence on which the lower court relied and the circuit court observed from its own viewing of the video that at one point Zamzow's tires were very close on the center line (although the court could not definitively discern if Zamzow had actually crossed the center line).

At the hearing on the reconsideration motion, the circuit court also said the fact the video identified an officer in some traffic making a rather abrupt maneuver to do a U-turn on a busy street was supportive of the officer's statement that he had observed the defendant cross the center line.

In dissenting, Reilly said Birkholz's statement about why he stopped Zamzow was undeniably testimonial because it described a past event with the purpose of establishing or proving that event in a later criminal prosecution and it was made by an officer who intended to bear testimony in that prosecution.

Zamzow contends that the confrontation clause does apply at pretrial suppression hearings. He says the Court of Appeals appears to hold that there is no right whatsoever to confrontation and cross-examination at a pretrial suppression hearing.

A decision by the Supreme Court is expected to clarify what rules apply at a pretrial suppression hearing.

Wisconsin Supreme Court
9:45 a.m.
Tuesday, Oct. 18, 2016

2015AP656-CR State v. Kozel

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Sauk County, Judge Guy D. Reynolds, reversed
Long caption: State of Wisconsin, Plaintiff-Respondent-Petitioner, v. Patrick K. Kozel, Defendant-Appellant-Respondent

Issue presented: This case examines issues arising from a drunken driving conviction, including:

- Is an emergency medical technician (EMT) who draws a person's blood while under the general supervision of a doctor a "person acting under the direction of a physician," under Wis. Stat. § 343.305(5)(b)?
- If blood is drawn under the implied consent law by a person not authorized to do so under § 343.305(5)(b), is suppression of the blood test results required?

Some background: In August 2013, Patrick K. Kozel was arrested for OWI, second offense, and was transported to the Sauk County jail. He consented to a blood draw and an EMT employed by the Baraboo District Ambulance Service drew two blood samples in a room at the jail. Testing of the samples showed that Kozel had a blood alcohol level of 0.196 percent.

Kozel was charged with OWI and operating a motor vehicle with a prohibited alcohol concentration, both as a second offense. He filed a motion to suppress the results of the blood test on the bases the blood draw was not administered by a "person acting under the direction of a physician," as required by § 343.305(5)(b), and that it was not conducted in a sterile setting.

The sole witness to testify at the suppression hearing was the EMT who performed the blood draw. He testified that at the time of Kozel's blood draw, he was employed as an EMT intermediate technician for the Baraboo District Ambulance Service and was certified and licensed to perform blood draws at the request of law enforcement. The EMT testified he administered Kozel's blood draw in a room at the jail designated for blood draws that appeared to be clean. He testified he conducted business under the authority of Dr. Manuel Mendoza, a Wisconsin licensed physician who serves as the medical director of the ambulance service.

The EMT testified he had been performing under Mendoza's supervision since June of 2009; that Mendoza occasionally shows up and gives trainings and supervises in general ways. The EMT further testified Mendoza "signs off" on any training or procedures that need approval; that he could contact Mendoza immediately by phone or could contact any on-duty physician at the local emergency room if needed; and that as an EMT he regularly does contact Mendoza and on-duty emergency room physicians.

On cross-examination, the EMT testified Mendoza had not trained him, had not observed him doing any procedures before certifying him, and had not observed the EMT perform any blood draws at the jail. The circuit court concluded the blood draw at the jail was reasonable and not contrary to the statutes and the motion was denied.

The Court of Appeals reversed and remanded, noting that § 343.305(5)(b) requires that blood draws for purposes of determining intoxication must be performed by a "person acting under the direction of a physician."

The court also noted that in State v. Penzkofer, 184 Wis. 2d 262, 266, 516 N.W.2d 774 (Ct. App. 1994), it held that a certified laboratory assistant who performed a blood draw in a hospital setting at the request of law enforcement was acting under the direction of a physician. In that case, the hospital pathologist in charge at the time blood was drawn testified that the lab assistant performed her functions under his general supervision and direction; the pathologist identified a written hospital protocol setting forth the detailed procedures to be followed; the procedures were reviewed and revised, and the protocol was signed and dated by a physician.

The appellate court noted that in State v. Osborne, No. 2012AP2540-CR, the court concluded that the evidence was sufficient to establish that the blood draw was performed by an EMT who was acting under the direction of a physician. The EMT in Osborne testified he was operating under a physician's supervision; there was testimony the physician signed off on the performance of the EMT's duties; the EMT was in at least monthly contact with the physician; and the EMT could be in contact with the physician at any time if needed.

In this case, the Court of Appeals concluded that the state failed to establish that the EMT performed the blood draw "under the direction of" Mendoza or any other physician. The appellate court said Mendoza's letter established that all EMT intermediate technicians with the Baraboo District Ambulance Services had authority to perform legal blood draws under Mendoza's license. The appellate court said evidence the EMT was authorized to act under Mendoza's license was not the same as evidence that the EMT was acting under Mendoza's direction, which is defined as "guidance or supervision of action, conduct or operation." Webster's Third New International Dictionary 640 (1993).

The Court of Appeals said unlike Penzkofer and Osborne, there was no evidence here that the EMT operated under written procedures or protocols from or approved by Mendoza; that Mendoza approved the performance of the EMT's blood draw duties on a regular or even an irregular basis; or that the EMT had regular or even irregular contact with Mendoza.

The state says in Penzkofer, the physician testified that the lab technician performed lab functions such as drawing blood "under his general supervision and direction." The state says there was nothing to indicate that the physician in Penzkofer did anything more than Mendoza did here. The state also says nothing in Osborne indicates that Mendoza did anything more in directing or supervising the EMT in that case than he did in this one.

The state also argues that even if blood is drawn under the implied consent statute by a person who does not fall under the categories listed in § 343.305(5)(b), suppression of the blood test results is not automatically required. The state says the Court of Appeals has remanded the case to the circuit court with instructions to suppress the blood test results, even though the appellate court did not conclude that the blood draw was not reasonable. The state says this means that the circuit court would be required to suppress blood test results establishing that Kozel's blood alcohol concentration, the best evidence establishing that he was operating a vehicle under the influence and with a prohibited alcohol concentration, even though the blood draw was reasonable and did not violate the Fourth Amendment.

Kozel argues that the Court of Appeals reached the correct decision under the specific facts of the case and under the statute as it existed at the time of his blood draw. Kozel says that the statute at issue has been amended to include "other medical professionals," so it is no longer necessary that a physician give direction to another drawing blood.

Wisconsin Supreme Court
10:45 a.m.
Tuesday, Oct. 18, 2016

2015AP79 Smith v. Anderson

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Pedro Colon, affirmed
Long caption: Maya Elaine Smith, Plaintiff, v. Jeff Anderson, d/b/a Anderson Real Estate Services, Defendant-Third-Party Plaintiff, v. 4th Dimension Design, Inc., Third-Party Defendant, R&B Construction, Inc., Third-Party Defendant-Appellant-Petitioner, West Bend Mutual Insurance Company, Intervenor-Respondent-Respondent

Issue presented: This dispute over insurance coverage arises from what could be characterized as a home sale gone bad. The Supreme Court reviews how the "four corners rule" may apply to the facts of this case, where the homebuyer alleges that the seller misrepresented the condition of the home and repair work that had been done.

Some background: The "four corners rule" states that duty to defend is based solely on the allegations within the complaint's four corners, without resorting to extrinsic facts or evidence, and focusing only on the nature of the claim, not its merits. Smith v. Katz, 226 Wis. 2d 798, 806, 595 N.W.2d 345 (1999). The insurer's duty arises when the allegations in the complaint coincide with the coverage provided by the policy. Under the rule, the court must assume all reasonable inferences in the complaint's allegations and resolve any doubts regarding the duty to defend in favor of the insured. Fireman's Fund Ins. Co. of Wis. v. Bradley Corp., 2003 WI 33, ¶20, 261 Wis. 2d 4, 660 N.W.2d 666.

Maya Smith filed a complaint against Jeff Anderson, d/b/a Anderson Real Estate Services, alleging that Anderson misrepresented the condition of the home that Anderson sold Smith. Smith alleged that after purchasing the home, she discovered multiple defects, including, but not limited to, plugged drain tiles and a leaky basement.

Smith then filed an amended complaint that alleged that Anderson painted and cleaned the basement to cover up apparent defects and failed to obtain proper permits prior to having structural repair work performed on the house.

Smith brought the following claims: (1) breach of contract; (2) intentional misrepresentation; (3) misrepresentation, in violation of Wis. Stat. §§ 895.446 and 943.20(1)(d) (2013-14); and (4) misrepresentation in violation of Wis. Stat. § 100.18. Smith alleged that she suffered pecuniary damages as a result of Anderson's alleged misrepresentations. She asked the trial court to "rescind the sale, return all moneys paid by the plaintiff in purchasing and improving the property, plus moving costs and other expenses related to the purchase of the property."

Smith's amended complaint did not make allegations against R&B Construction, which Anderson had hired to fix basement issues at the house.

Anderson filed a third-party complaint against R&B and 4th Dimension Design, Inc., an engineering firm which provided design drawings for R&B's work. Anderson's third-party complaint stated that "[i]n the event that [Anderson] is found obligated to the plaintiff in any

respect then [Anderson] demands that [Anderson] be made whole for any amounts [Anderson] may be obligated to pay to the plaintiff from the third party defendants."

Anderson's third-party complaint made no allegations of faulty, negligent, or defective work against R&B, but sought contribution and/or indemnification from R&B and 4th Dimension in the event Anderson was found liable to Smith, and demanded that R&B "perform any and all work that is required to correct any defects, deficiencies or conditions arising out of or relating to the work performed by [R&B]."

R&B tendered its defense to West Bend Mutual Insurance Co., which agreed to defend R&B under a reservation of rights to dispute coverage. West Bend then filed a motion to bifurcate and stay the proceedings, which the trial court granted.

West Bend moved for summary judgment, arguing that it did not have a duty to defend R&B under R&B's Contractors Business Owners liability policy because neither Smith's amended complaint nor Anderson's third-party complaint alleged covered "occurrences" within the meaning of the policy. The West Bend policy generally provided liability coverage for property damage caused by an "occurrence."

West Bend argued that Smith's allegations focused on Anderson's intentional conduct – not on property damage caused by an accident. West Bend alleged that if Anderson provided misleading information about the house, his conduct constituted an "action," not an "accident." West Bend also argued that Anderson's third-party complaint made no allegations of property damage, instead seeking contribution and indemnification; thus, the third-party complaint did not allege any conduct by R&B covered in the policy.

R&B opposed West Bend's summary judgment motion. R&B argued that the "continuous and repeated exposure to water leaking into the basement and sediment plugging the drain tile" was an occurrence which caused property damage within the meaning of the West Bend policy. R&B argued that because Smith's complaint asked for repair costs, Smith, in essence, alleged property damage.

The trial court granted West Bend's motion. R&B appealed, unsuccessfully. R&B argued that the West Bend policy provides a duty to defend R&B against property damage claims, and that Smith was claiming that she suffered property damage as a result of an "occurrence;" i.e., the continuous and repeated exposure to water leaking into the basement and sediment flowing into the drain tile causing the drain tile to plug.

Citing the four corners rule, the Court of Appeals held that none of the allegations can be construed as "occurrences" under the policy definition, even under the most liberal rules of pleading. The Court of Appeals held that the causes of action pled in Smith's amended complaint are for various forms of misrepresentation that allegedly occurred when Anderson sold the property to Smith. Although the misrepresentations concern physical defects with the home, the damages alleged are "pecuniary in nature and do not constitute property damage."

The Supreme Court considers:

- Can a third-party complaint state a claim that an insurance company has a duty to defend, where the complaint against the third-party plaintiff is for misrepresentation?
- Should a party looking to his insurance company to provide him with a defense be able to introduce information not stated in the pleadings to show that there could be claims requiring his insurer to provide a defense?
- Can a party denied a defense after his insurance company succeeds on a motion for summary judgment reassert a right to a defense if later developments in the case show that he is entitled to a defense?

Wisconsin Supreme Court
1:30 p.m.
Tuesday, Oct. 18, 2016

2014AP1767-CR State v. Harris

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Kenosha County, Judge S. Michael Wilk, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent-Respondent, v. Brian I. Harris, Defendant-Appellant-Petition

Issue presented: This case examines whether law enforcement's request for a "statement" from a person in custody is an interrogation under the terms of Miranda v. Arizona, 384 U.S. 436 (1966).

Some background: Brian I. Harris was charged with one count of burglary of a building or dwelling as a repeater; one count of possession of burglarious tools as a repeater; one count of criminal damage to property as a repeater; and one count of criminal trespass as a repeater.

In the early morning hours of Aug. 13, 2011, the occupant of a townhouse on 63rd Street in Kenosha had called the police regarding a suspicious noise coming from the attached townhouse. Officer Justin Niebuhr arrived at about 3:22 a.m. He went inside the caller's home and heard a loud, constant, fairly rhythmic clanging of metal that was continuous for several minutes coming from the adjacent unit. Niebuhr went to the back of the house and found evidence of forced entry.

Another officer arrived, and entered the house with Niebuhr. The officers discovered Harris seated on the basement stairs. He was wearing black gloves, there was copper piping on the floor that appeared to have been cut from the basement ceiling, and a duffel bag on the floor with tools in it, including a saw with replacement blades, a bolt cutter type of tool, several crowbars, a couple of flashlights, and a large garbage bag. Harris was arrested and transported to jail.

The next morning at about 9 a.m., Detective Chad Buchanan went to the jail to interview Harris. Harris was brought to Buchanan in a common area, in a hallway, outside of the interview rooms. Buchanan asked Harris if he would like to give a statement to which Harris responded, "They caught me, man, I got nothing else to say."

Harris moved to suppress statements attributed to him at the scene of his arrest and at the jail because required Miranda warnings were not given at either scene. He argued that under the totality of the circumstances, his statements were not voluntary.

An evidentiary hearing was held. As relevant, Buchanan testified about the statement at the Kenosha County Jail. Buchanan testified, "I went there [to the jail] with the intention of asking Mr. Harris if he would like to come with me to the detective bureau to be interviewed. I asked him if he would, and he stated to me something to effect that they caught me, what's the point." The conversation, which was not videotaped or recorded, ended there. Harris did not testify at the suppression hearing. The trial court denied the motion to suppress.

At jury trial, Harris said he spent the day and evening of the burglary drinking alcohol with a friend and was so drunk that he recalled little from the evening other than he faintly

recalled leaving the bar at about 2:30 a.m. Harris said he walked in the direction of 64th Street because he planned to stay at a friend's house. He did not recall if he made it to his friend's and the next thing he remembered was a police officer standing over him. Harris explained he knew he did not have consent to be in the house but didn't remember the incident. He claimed the duffle bag of tools did not belong to him.

Harris was convicted on all four counts and sentenced to 30 months probation on counts one and two, and to 24 months probation on counts three and four.

He appealed, unsuccessfully.

The Court of Appeals ruled that Buchanan's questioning of Harris, "did not constitute 'interrogation,' and thus the detective did not err in failing to provide Harris the Miranda warnings." State v. Harris, Appeal No. 2014AP1767-CR, slip op., ¶1 (Wis. Ct. App. December 30, 2015).

Harris contends that the Court of Appeals' decision conflicts with Rhode Island v. Innis, 446 U.S. 291 (1980) and its progeny. Harris contends that he was deprived of his constitutional rights when he gave self-incriminating statements in response to police questioning while in custody and without having received Miranda warnings.

He asserts that under Innis, the request for the statement, directed at Harris while he was in custody and hours after his arrest and booking, was not ministerial. He contends that it was an interrogation under Innis. He contends that questioning of a person in custody as to whether or not he wants to provide a statement *is* interrogation versus merely ministerial questioning and that officers and detectives cannot reasonably claim to be surprised that a request for a statement elicits inculpatory statements.

The State contends that it was "merely a preliminary benign inquiry designed to elicit a 'yes' or 'no' answer." Thus, the State asserts that the "Court of Appeals properly concluded that Deputy Buchanan's query could not be reasonably perceived as an attempt to elicit an incriminating response."

The Supreme Court is expected to decide how the law applies here and whether Harris was deprived of his right against self-incrimination and his rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Wisconsin Constitution.

Wisconsin Supreme Court
9:45 a.m.
Thursday, Oct. 20, 2016

2014AP2840-CR State v. Allen

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Jeffrey A. Wagner, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Christopher Joseph Allen, Defendant-Appellant-Petitioner

Issue presented: In this case, the Supreme Court reviews two issues relating to the state's expunction statute, Wis. Stat. § 973.015:

- whether the circuit court violated case law established in State v. Leitner, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341 when it considered at sentencing that Christopher Joseph Allen had an expunged conviction and served a term of probation. (In Leitner, the Wisconsin Supreme Court held that circuit courts cannot consider an expunged record of conviction, but may consider the facts underlying an expunged record of conviction at sentencing; and
- whether trial counsel was ineffective for failing to object to the references to Allen's expunged conviction in the presentence investigation and at sentencing.

Some background: Christopher Joseph Allen pled guilty and was convicted of both injury and homicide by intoxicated use of a vehicle. The Court of Appeals affirmed the denial of his motion for a new sentencing hearing.

Generally speaking, § 973.015 permits a trial court, upon a party's motion or sua sponte, to expunge a conviction if: (1) the offender was under 25 at the time the offense was committed; (2) the maximum penalty for the offense to be expunged is six years or less; and (3) the offender and society will not be harmed by the disposition. *See* ***id.***; *see also* Wis. JI – Criminal SM-26; State v. Hemp, 2014 WI 129, ¶20, 359 Wis. 2d 320, 856 N.W.2d 811.

In this case, § 973.015 came into play during Allen's sentencing hearing. As part of the plea agreement, the state agreed to recommend four years of initial confinement, leaving the extended supervision up to the court. The court-ordered pre-sentence investigation (PSI) report revealed that Allen had a substantial battery conviction eight years earlier, for which Allen had received a withheld sentence conditioned on paying restitution and completing anger management classes and probation.

Allen met all of these conditions, so the trial court expunged his conviction. At the sentencing hearing in this case, the trial court did not discuss the facts underlying Allen's expunged conviction, but it did observe that Allen had failed to learn from his previous probationary period the consequences of breaking the law.

The trial court ultimately sentenced Allen to five years of initial confinement and four years of extended supervision, thereby exceeding the state's recommendation of four years of initial confinement.

Allen filed a post-conviction motion, asserting that he was entitled to a new sentencing hearing on the grounds that: (1) the trial court violated the teachings of Leitner, when it

considered Allen's expunged conviction at sentencing by referencing his prior period of supervision; and (2) his trial counsel was ineffective for failing to object to references to the expunged conviction in the PSI and at sentencing.

The trial court denied the motion, holding that the court "did not consider the defendant's prior conviction," but did consider the fact of "his prior supervision and his opportunity to learn from that experience." Allen appealed, unsuccessfully. The Court of Appeals rejected Allen's claim that the trial court's comments ran afoul of the Wisconsin Supreme Court's ruling in Leitner.

Having concluded that the references to Allen's expunged conviction in both the PSI and by the sentencing court were proper, the Court of Appeals rejected Allen's claim that his trial counsel was ineffective for failing to object to those references, as any such objection would have been meritless.

Allen points out that, under Leitner, a trial court cannot consider "an expunged record of conviction," thereby enabling the offender "to have a clean start so far as the prior conviction is concerned," and asks how this principle squares with the Court of Appeals' holding that a sentencing court may consider "all of the facts underlying an expunged criminal record."

A decision by the Supreme Court could clarify how the state's expunction statute, Wis. Stat. § 973.015 applies to the circumstances presented.

Wisconsin Supreme Court
10:45 a.m.
Thursday, Oct. 20, 2016

2014AP1870-CR State v. Howes

Supreme Court case type: Certification
Court of Appeals: District IV
Circuit Court: Dane County, Judge John W. Markson
Long caption: State of Wisconsin, Plaintiff-Appellant, v. David W. Howes, Defendant-Respondent

Issue presented: Whether provisions in Wisconsin's implied consent law authorizing a warrantless blood draw from an unconscious suspect violate the Fourth Amendment to the United States Constitution. More specifically, District IV says the issue is whether the "implied consent" that is deemed to have occurred before a defendant becomes a suspect is voluntary consent for purposes of the consent exception to the Fourth Amendment's warrant requirement. District IV notes the implied consent law provides that a person drives a motor vehicle on a Wisconsin public highway is generally deemed to have consented to blood alcohol testing.

Some background: Police were dispatched to the scene of an accident involving a motorcycle and a deer. The deer had been killed and the driver of the motorcycle, David W. Howes, was seriously injured and unconscious. Howes smelled of alcohol, and he was taken to a hospital. While there, and while still unconscious and hooked up to a respirator, an officer directed medical personnel to draw a blood sample. Police did not obtain a warrant but relied on the statutory authority for a warrantless blood draw found in § 343.305(3)(ar), Stats. In other words, police relied on Howes' "implied consent" to the blood draw. Testing showed a blood-alcohol content of 0.11 percent.

Howes was charged with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood-alcohol concentration, both fourth offenses. Howes filed a suppression motion, arguing that statutory implied consent is not voluntary consent within the meaning of the Fourth Amendment.

The circuit court granted the motion, relying on the Court of Appeals' decision in State v. Padley, 2014 WI App 65, ¶26, 354 Wis. 2d 545, 849 N.W.2d 867.

The circuit court likened statutory implied consent to the sort of categorical exigent circumstances exception that was found unacceptable in Missouri v. McNeely, 569 U.S. ____, 133 S. Ct. 1552 (2013).

The state appealed, raising the issue whether the circuit court correctly concluded that testing can be authorized only by "actual" consent given at the time of a request by an officer and that provisions in the law that presume an unconscious person has not withdrawn consent to testing, and therefore has consented, are unconstitutional.

District IV says the specified circumstance applicable in this case is found in § 343.305(3)(ar)1., which applies when a suspect has operated a motor vehicle involved in an accident causing substantial bodily harm to any person (in this case Howes himself) and an officer has detected the presence of alcohol on the suspect. District IV says when those

circumstances are present and the suspect is unconscious, the statute authorizes a warrantless blood draw.

Howes argues that Wisconsin's implied consent law, as applied to unconscious suspects, is unconstitutional because it contains a per se consent formula that does not take into account the individual circumstances of the case. Howes argues that the unconscious suspect provisions of the implied consent law are the functional equivalent of the type of categorical rule that was rejected in McNeely. Missouri v. McNeely, 569 U.S. ____, 133 S. Ct. 1552 (2013).

District IV outlines a series of other prior case decisons that may come into play in deciding this case. A decision by the Supreme Court is expected to clarify potentially conflicting decisions or parts of decisions of the Court of Appeals, Wisconsin Supreme Court and U.S. Supreme Court.

Wisconsin Supreme Court
1:30 p.m.
Thursday, Oct. 20, 2016

2014AP2236 Moya v. Healthport Technologies, LLC

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Karen E. Christenson; Judge Pedro Colon
Long caption: Carolyn Moya, Plaintiff-Respondent-Petitioner, v. Aurora Healthcare, Inc. and Healthport Technologies, LLC, Defendants-Appellants-Respondents

Issue presented: This case examines Wis. Stat. §§ 146.81 - 146.83 (2013-14) to determine whether personal injury attorneys are exempt from the $8 certification and $20 retrieval fees under the health-records-fee statute, § 146.83(3f), when an attorney orders a client's healthcare records with the client's written permission.

Some background: After being injured in a car accident, Carolyn Moya's personal injury lawyer had Moya sign HIPAA forms authorizing the release of her medical records to her lawyer's law firm. Moya's lawyer sent a request for the records to Aurora Healthcare Inc., which had a contract with HealthPort to fulfill the records request. HealthPort sent certified copies of Moya's medical records to her lawyer along with invoices listing the charges, including a $20 retrieval fee and $8 certification fee. The invoices were all paid by the law firm.

Moya later filed a class action complaint alleging that HealthPort violated § 146.83(3f) by charging her attorney the retrieval and certification fees. She argued that her attorney was a "person authorized by the patient" and therefore exempt from having to pay retrieval or certification fees. HealthPort filed a motion to dismiss the complaint, which the trial court denied.

After discovery, HealthPort filed a motion for summary judgment asserting that the proper interpretation of §§ 146.81 - 146.83 shows that Moya's attorney was not a "person authorized by the patient" – and therefore was not exempt from having to pay retrieval or certification fees – because that term means a person whom the patient has given the power to consent to release of her healthcare records to others. A client's signed HIPAA authorization only gives a personal injury attorney the right to obtain and view healthcare records, but not the right to have healthcare providers release those records to others.

The trial court denied HealthPort's motion, ruling that "person authorized by the patient" had different degrees of meaning. It held that the phrase meant authority "to consent to the release of records" under § 146.81(5), but under § 146.83, the phrase meant anyone whom the patient gives "the authority to inspect the patient's health care records."

HealthPort filed a motion for reconsideration, arguing that the recent amendment to § 146.83, adding subsection (1b), demonstrated that the trial court's earlier interpretation of the statute was incorrect. Subsection (1b) made state public defenders a "person authorized by the patient" when the attorney has written informed consent.

The trial court denied the motion for reconsideration. HealthPort filed a petition to appeal from the nonfinal orders, which the Court of Appeals granted.

The Court of Appeals, Judge Joan F. Kessler dissenting, reversed the trial court's orders. The Court of Appeals held that Moya's attempt to extract the phrase "any person authorized in writing by the patient" from the context of § 146.81(5) and read it in isolation in order to give her attorney the power over the release of Moya's healthcare records runs contrary to the plain and contextual meaning of the language used by the Legislature in crafting these statutes.

This definition does not include Moya's attorney, the Court of Appeals held, because it does not include attorneys who only have a HIPAA release from their client. A HIPAA release allows an attorney to obtain a copy of a client's medical records, but it does not give that attorney the power to consent to the release of Moya's confidential healthcare records.

Moya now asks the Supreme Court to review whether a person authorized in writing by a patient may obtain the patient's medical records without having to pay the certification or retrieval fees set forth in Wis. Stat. §146.83(3f)(b).

Wisconsin Supreme Court
9:30 a.m.
Wednesday, Oct. 26, 2016

TO BE HEARD AT THE BAYFIELD COUNTY COURTHOUSE
117 E. 5th STREET, WASHBURN, WISCONSIN

2015AP158-CR State v. Mattox

Supreme Court case type: Certification
Court of Appeals: District II
Circuit Court: Waukesha County, Judge Jennifer Dorrow
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Rozerick E. Mattox, Defendant-Appellant.

Issue presented: This certification examines issues relating to the confrontation clause of the Sixth Amendment to the U.S. Constitution. The Wisconsin Supreme Court reviews whether a defendant's constitutional rights were violated when the state introduced at trial a toxicology report of a deceased victim together with a medical examiner's testimony, based in part on the report, where the author of the report did not testify and was not made available for examination by the defendant. The Supreme Court considers the case in light of U.S. Supreme Court decisions and in light of potentially conflicting decisions of the Court of Appeals.

Some background: Rozerick Mattox was found guilty, following a bench trial, of first-degree reckless homicide by delivery of heroin relating to the death of S.L.

S.L. was found dead in his bedroom, and evidence from the scene included drug paraphernalia. Waukesha County Associate Medical Examiner Dr. Zelda Okia performed the autopsy of S.L. and determined that heroin was the likely cause of S.L.'s death.

Okia testified regarding procedures for sending biological samples to a St. Louis University laboratory for testing. Okia testified that she relied on her experience, and in part, on the toxicology report she received from the lab in making her ultimate determination that S.L. died of "acute heroin intoxication." Mattox's counsel timely objected on Confrontation Clause grounds to introduction of the toxicology report as well as Okia's testimony based upon the report. Mattox contends his rights were violated because he had no opportunity to cross-examine the author (or anyone from the laboratory) regarding the report.

In certifying the case, the Court of Appeals explains that there is a significant tension between two recent Court of Appeals' decisions in cases with very similar facts to this case: State v. Heine, 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409 and State v. VanDyke, 2015 WI App 30, 361 Wis. 2d 738, 863 N.W.2d 626, as well as U.S. Supreme Court and Wisconsin Supreme Court decisions.

In both Heine and VanDyke, as in this case, the defendant was convicted at trial of reckless homicide related to the delivery of heroin. VanDyke, 361 Wis. 2d 738, ¶1; Heine, 354 Wis. 2d 1, ¶1.

In all three cases, a medical examiner testified for the state regarding the autopsy and toxicology test results in a report from a laboratory identifying the substances found in the victim's system; the report itself was received into evidence; and no one who had direct

involvement with the testing or analysis of the victim's specimens testified at the trial. *See* VanDyke, 361 Wis. 2d 738, ¶¶3, 8, 27; Heine, 354 Wis. 2d 1, ¶1.

In Heine and VanDyke the Court of Appeals appears to indicate that if a medical examiner, based upon his/her personal experience and direct observations, strongly suspects—without the assistance of a confirming toxicology report—the victim died of a heroin overdose, it would not matter as far as a defendant's Confrontation Clause rights are concerned that the report served as a partial confirming basis for the examiner's final cause-of-death determination. *See* VanDyke, 361 Wis. 2d 738, ¶25; Heine, 354 Wis. 2d 1, ¶15.

However, if a report "directly proved [a victim's] 'use,' and was the conclusive basis of [the examiner's] cause-of-death opinion," [language omittted] then a defendant *would have* the Confrontation Clause right to cross-examine the author of the report or an appropriate person from the laboratory. *See* VanDyke, 361 Wis. 2d 738, ¶25; *see also* Heine, 354 Wis. 2d 1, ¶¶9, 15.

The Court of Appeals expresses concern that "such a position would appear to be at odds with the United States Supreme Court's holdings in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), and Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705 (2011), and this court's recent holding in State v. Griep, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, *cert. denied*, Griep v. Wisconsin, No. 15-126, 2016 WL 100365 (U.S. Jan. 11, 2016)."

In Melendez-Diaz, the U.S. Supreme Court concluded that analysts' affidavits admitted into evidence at trial and containing the results of forensic analysis showing that a substance connected to the defendant was cocaine "were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." Melendez-Diaz, 557 U.S. at 307, 311.

In Bullcoming, a report showed Bullcoming's blood-alcohol concentration to be well above the threshold for aggravated operating while intoxicated and the Court ultimately rejected New Mexico's attempt to introduce the report—not through the analyst who signed the certification—but instead through another analyst from the lab who was familiar with the testing procedures at the lab.

The Court of Appeals states that the Wisconsin Supreme Court's recent decision in Griep does not resolve the apparent conflicts between Heine and VanDyke and the U.S. Supreme Court decisions in Melendez-Diaz and Bullcoming. The case differs from Griep in that Okia did not testify about reviewing the St. Louis University laboratory file, raw data or procedures for the lab, but rather appears to have relied on the expertise of analysts at the lab and the final test results obtained from the work of others at that lab. In short, the Court of Appeals is concerned that its "view of the Confrontation Clause, as expressed in Heine and VanDyke, appears to be in conflict with the view of the Supreme Court as expressed in Melendez-Diaz and Bullcoming."

Wisconsin Supreme Court
11 a.m.
Wednesday, Oct. 26, 2016

TO BE HEARD AT THE BAYFIELD COUNTY COURTHOUSE
117 E. 5th STREET, WASHBURN, WISCONSIN

2014AP2376 Brenner v. National Casualty Co.

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Richard S. Sankovitz, affirmed
Long caption: Russell T. Brenner and Donna Brenner, Plaintiffs-Respondents-Respondents, v. National Casualty Company and Milwaukee World Festival, Inc., Defendants-Appellants-Petitioners, Amerisure Mutual Insurance Company, Garland Brothers Joint Venture and Garland Brothers, Inc., Defendants, Charter Manufacturing Co. and Ace American Insurance Company, Defendants-Respondents.

Issue presented: This case, arising from a dispute over liability for a worksite accident, examines the rule of caveat emptor (let the buyer beware), and an exception to that rule as expressed in Restatement (Second) of Torts §§ 352 and 353.

Some background: Russell Brenner was severely injured while he was working for Hunzinger Construction. He fell through a large hole or pit in the floor of a building owned by Milwaukee World Festival, Inc. while moving a large plywood panel that covered the hole.

Brenner and his wife filed suit, alleging negligence and safe-place statute claims against the following parties:

- Milwaukee World Festival, Inc., as the owner of the building at the time of Brenner's fall, and its insurer National Casualty Company, (collectively "MWF");
- Garland Brothers Joint Venture, as the former owner of the building; Garland Brothers, Inc., (GBI) as an agent of Garland Brothers Joint Venture; and their insurer Amerisure Mutual Insurance Company, (collectively "Garland Brothers"); and
- Charter Manufacturing Co., as the former long-term tenant of the building, and its insurer Ace American Insurance Co. (collectively "Charter").

Before MWF acquired the property, Charter Manufacturing was a long-term tenant of the building under a lease with Garland Brothers. Charter had used the pit for its furnaces used to heat metal as part of a wire manufacturing process.

An agent of GBI assumed responsibility for negotiating the termination of Charter's lease. As part of the negotiations, GBI retained a consultant to inspect the building before Charter vacated it. Before surrendering the premises, Charter was asked to fill in the pit immediately below the holes in the floor where the heat treat furnaces had been located. Charter refused to do so. In November 2009, Charter was permitted to surrender the property without filling the pit, so long as the pit was left in a "clean and safe condition."

In late December 2009, GBI did a final walkthrough of the property with its experts and Charter representatives. GBI did not raise any more concerns about the pit.

After Charter vacated the building, Garland Brothers sold it to MWF in "as-is, where-is condition," and "with all faults." MWF took possession of the property in May 2011.

Prior to the purchase, and before Brenner was injured, MWF had performed numerous inspections and walkthroughs of the premises.

Garland Brothers and Charter filed motions for summary judgment on the grounds that they could not be liable for Brenner's injuries due to their relinquishment of the premises well before he was injured. The Brenners and MWF opposed the motions.

The trial court granted the motions for summary judgment. As relevant here, the trial court found that Restatement (Second) of Torts § 352 acted to bar the Brenners' negligence claim against Charter.

Following motions for summary judgment, the trial court dismissed the Brenners' negligence claim against Charter and Garland Brothers on the grounds that it was barred by the doctrine of caveat emptor, or "buyer beware," as expressed in Restatement (Second) of Torts § 352. The trial court reasoned that because Charter had already relinquished possession of the premises before MWF purchased the property and before Brenner was injured, § 352 applied to shift liability from Charter to the buyer, MWF.

MWF appealed Charter's dismissal from the lawsuit. MWF lost its case at the Court of Appeal and now asks the Supreme Court to review the following issues:

- Should Wisconsin adopt the Restatement (Third) of Torts § 51 which supersedes the Restatement (Second) of Torts §§ 352 and 353?
- Does the Restatement (Second) of Torts § 352 relieve former possessors of land, like Charter, from liability for hazards created at their direction?
- Under the Restatement (Second) of Torts § 353, does the liability of a former possessor of land who concealed a hazardous condition it created continue until the current possessor has actual knowledge of the condition?

Wisconsin Supreme Court
2 p.m.
Wednesday, Oct. 26, 2016

TO BE HEARD AT THE BAYFIELD COUNTY COURTHOUSE
117 E. 5th STREET, WASHBURN, WISCONSIN

2015AP202-CR State v. Denny

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Ozaukee County, Judge Joseph W. Violand, reversed
Long caption: State of Wisconsin, Plaintiff-Respondent-Petitioner, v. Jeffrey C. Denny, Defendant-Appellant-respondent.

Issues presented:

- Did the Court of Appeals misapply State v. Moran, 2005 WI 115, 284 Wis. 2d 24, 700 N.W.2d 884, when it held that a defendant seeking post-conviction DNA testing of "relevant" evidence under Wis. Stat. § 974.07(2) need not demonstrate that the physical evidence "contains biological material or on which there is biological material" as provided under subparagraph § 974.07(6)(a)2.?
- In reviewing a motion for DNA testing at state expense under Wis. Stat. § 974.07(7)(a), must a circuit court always assume that a DNA test result will be exculpatory?
- In assessing whether it is "reasonably probable" that a defendant would not have been convicted if exculpatory DNA results had been available, should a circuit court apply a newly discovered evidence standard?
- Did the circuit court erroneously exercise its discretion under Wis. Stat. § 974.07(7)(a) when it found that the jury would have convicted Jeffrey C. Denny even if exculpatory DNA results were present?

Some background: The Court of Appeals' reversed a circuit court order denying Jeffrey C. Denny's § 974.07, Stats., motion to test certain items at private or public expense for the presence of deoxyribonucleic acid (DNA).

A jury found Jeffrey C. Denny and his brother, Kent Denny, both guilty of first-degree murder as party to a crime for killing Christopher Mohr in 1982. Both men were sentenced to life in prison. Mohr had suffered blunt force trauma to the head and sustained over 50 stab wounds. His clothes were soaked in blood, as were many objects found around the crime scene.

Jeffrey appealed. The Court of Appeals affirmed. A habeas petition filed in federal court was dismissed in 1998. The 7th Circuit affirmed. In May of 2014, Jeffrey moved to have certain evidence recovered from the crime scene tested for DNA. He identified the following items for testing: (1) pieces of a bong pipe, (2) hairs removed from Mohr's hands, (3) stray hairs found on Mohr's body, (4) the yellow hand towel, (5) the gloves found near Mohr, (6) the bloody hat found near Mohr, (7) Mohr's bloody clothing, (8) blood on the metal chair found near Mohr's head, (9) the glass cup found near Mohr, (10) the lighter that was under Mohr's right shoulder, (11) the screens found on Mohr's back and clothing, (12) the two facial breathing masks, and (13) Mohr's hair.

Jeffrey argued that this evidence was relevant to the investigation or prosecution that resulted in his conviction; that it was in the possession of the state; and that it either had not been previously subjected to forensic DNA testing or, if it had been previously tested, it may now be subjected to another test using a scientific technique that was not available or not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

Jeffrey also argued it was "reasonably probable" that he would not have been prosecuted or convicted if "exculpatory DNA results had been available before" the prosecution or conviction. Jeffrey argued he was entitled to have the items tested at the public's expense or, at the very least, at private expense.

The circuit court denied the motion. It concluded the evidence requested for testing did not relate to any of the evidence presented against Jeffrey at trial, because the evidence that resulted in the conviction was the many inculpatory statements Jeffrey and Kent had made to others. The trial court also noted that Jeffrey had been convicted as a party to the crime so even if DNA evidence established that another person was involved in the crime, it would not change the evidence that Jeffrey had also participated in the murder as a party to the crime.

The circuit court said the purpose of § 974.07 was to exonerate the innocent and not to show that someone else was involved in a murder. The court also concluded that the results would not exculpate Jeffrey but at most would show that others, in addition to Jeffrey, might have been involved. The Court of Appeals reversed and remanded.

The appellate court noted that in Moran, 284 Wis. 2d 24, ¶¶3, 42 the Wisconsin Supreme Court interpreted the statute to permit DNA testing of evidence at either private or public expense. The statute gives a movant, at his or her own expense, the right to conduct DNA testing of "physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material" if the movant shows that the evidence is relevant to the investigation or prosecution that resulted in the conviction; the evidence is in the actual or constructive possession of a government agency; and the evidence has not been subject to forensic DNA testing or, if it was tested, may now be subjected to another test that was not available or not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

The Court of Appeals concluded Jeffrey showed that the evidence met the conditions under § 974.07(2), permitting him to test the evidence at his own expense. The appellate court went on to find that it was reasonably probable that Jeffrey would not have been convicted if exculpatory results had been available.

The state says the Court of Appeals dismissed its concerns that "assumed exculpatory evidence" will significantly expand post-conviction testing to any item of evidence that could conceivably contain DNA. The state says at the motion hearing, Jeffrey offered no evidence that supported his speculative theory that an analyst could recover touch DNA from physical evidence 30 years after Mohr's murder.